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Our weapons must be fair – but devastating

Terrorists are modern; they use mobile phones and e-mail. We have to modernise too to fight them in the courtroom

Ken Macdonald

In early August 2006 I was on holiday when I received a phone call from Sue Hemming, the redoubtable figure we had recently appointed as the first Head of the new Counter Terrorism Division of the Crown Prosecution Service. She was at Scotland Yard and she had rung to brief me on the airline plot. Within half an hour I was talking to my counterpart in the Justice Department in Washington. It was the start of the gravest terrorism prosecution to surface during my five years as Director of Public Prosecutions.

Prosecutors had never doubted the seriousness of the security threat that Islamist extremists represented to this country. Through our work we well understood that home-grown actors, succoured and encouraged by more senior figures abroad, were formidably determined. They were also highly ambitious. It was depressing to us when the arrests of the plotters were accompanied by familiar claims of stitch-up and establishment conspiracy. We decided that this had finally become an important question of public confidence and reassurance. So, for the first time, we announced our charging decisions against the plotters during a press conference covered live on television. And in a controlled and clinical way, we gave the barest outline of some of the material the investigation had uncovered. This included, of course, the martyrdom videos.

Not everyone approved of this. Some of those who had been crying foul at the arrests now objected to the revelation that evidence had, indeed, been uncovered. Others, more seriously, worried that fair trials might be compromised. We understood this concern and we agonised over it. But, finally, we felt that it was possible to find a middle way: we could reassure an anxious and polarised public that the process of prosecution we were embarking upon was appropriate and constitutional, without presenting any threat at all to the integrity of the proceedings.

It is, of course, critical that our system of justice has the confidence to evolve and to modernise itself in these ways, while remaining true to its deepest principles. This is the test of its ability to survive the ravings of airline plotters. And who can doubt that it will do so?

We should be more confident. Much can change to meet modern threats. Of course, we should not attack the liberty of individuals who remain unconvicted of any crime. Control orders are a hopeless device in a modern democracy. They are a small gasp of defeat.

The law lords were right to curtail the Government's ability to exercise this offensive practice, inconsistent as it was with very many years of constitutional principle. But other reforms are entirely consistent with our proudest view of ourselves, sharpened to respond to violence.

Recently there have been leaks that the Government's review into the use of intercept evidence in criminal trials is not going well. We are told that, disappointingly, testing is not progressing as we might hope. It's all looking terribly difficult. The leakers portray themselves with aching, heavy hearts.

We should prescribe them some statins. In 2004, at the request of Peter Goldsmith, then Attorney-General and an enlightened supporter of reform, I visited the US and Australia to see how they managed. They were bemused. It seemed to them odd that someone would travel thousands of miles to discover what was obvious: that the best evidence against a man is the talk coming out of his own mouth.

I said to them that some people in Britain worried if we used intercept evidence in courts it would reveal techniques and abilities to terrorists. The Australians smiled and told me about a man they were monitoring who worried he was being overheard on his mobile phone. On a beach with his family, he

walked out into the sea. "I think my line is being listened to," he told his partner in crime. "I'll hang up — you call me back."

Not everyone is comic book dumb. But people, whether they are traders in the City or Taleban in the Swat Valley, have to talk to do business. They all use phones. And, as Yahoo! helpfully reminded us in the airline trial, they use the internet too.

It's time for these rules of evidence to encounter the modern world. As crime has grown more sophisticated and international, communications have become more essential to its progress over borders. It is difficult to understand a system that willingly rules this out of play in our courts. Instead of condemning shadowy figures to house arrest, we should focus on giving our prosecutors new weapons that are fair — as well as devastating.

And this is a motif for a modern approach to medieval assault. When I spoke to my colleague in Washington, he was nervous. In truth, he thought we Brits were a little soft. He didn't think our prosecutors were tough enough and he didn't trust our judges to pass sufficiently powerful sentences. For my part, I thought the lower manifestations of his Administration's War on Terror had disillusioned hundreds of millions of people. I thought that our democratic institutions, which should have been a shining beacon to the world, had allowed themselves to be portrayed as the epitome of hypocrisy. I thought this had made us all less safe.

Jonathan Evans, the Director- General of the Security Service, observed last year that all our successful prosecutions had a "chilling effect" on impressionable would-be terrorists. He was right. But they have had another effect too. They have vindicated our insistence that, in spite of ill-considered political attacks during the Blair years, our constitutional principles do remain modern: we best protect ourselves by protecting our constitution. Our adherence to the rule of law is what defines us.

Ken Macdonald, QC, practises at Matrix Chambers and is a visiting professor of law at the London School of Economics. He was Director of Public Prosecutions, 2003-08

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